

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SUE ANN MINARD, et al., : CIVIL ACTION NO. 06-645 (MLC)

Plaintiffs, : **O R D E R**

v. :

M. IAZZETTI, et al., :

Defendants. :
_____ :

THE PLAINTIFFS, Sue Ann Minard, Patricia Furino, and Elena Shuster (collectively, "plaintiffs"), having alleged that the defendants, M. Iazzetti and the Estate of Martin H. Adler (collectively, "defendants"), breached their duties of care and loyalty under the New Jersey Uniform Partnership Act ("the Act") in the Second Amended Complaint (dkt. entry no. 23, 2d Am. Compl.); and the Court having granted the defendants' motion to dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), and dismissed without prejudice the Second Amended Complaint with leave to move to reopen the action, with a proposed further amended complaint annexed thereto, on May 15, 2007 ("5-15-07 Order") (dkt. entry no. 39); and the plaintiffs now moving to reopen the action, with a proposed Third Amended Complaint annexed thereto, pursuant to the 5-15-07 Order (dkt. entry no. 40); and the defendants opposing that motion (dkt. entry no. 43); and

IT APPEARING that leave to amend the pleadings under Rule 15(a) is generally given freely, Foman v. Davis, 371 U.S. 178,

182 (1962); but it also appearing that the Court may deny a motion to amend on grounds such as undue delay, bad faith, dilatory motives, futility, repeated failure to cure deficiencies by previously allowed amendments, or prejudice to the opposing party by allowing the amendment, Hill v. Scranton, 411 F.3d 118, 134 (3d Cir. 2005); Long v. Wilson, 393 F.3d 390, 400 (3d Cir. 2004); and it appearing that absent such circumstances, a motion for leave to amend a pleading should be granted, Long, 393 F.3d at 400; and

IT APPEARING that the standard for determining whether an amendment would be futile requires the Court to consider whether the complaint, as amended, would fail to state a claim upon which relief could be granted, In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997); and it appearing that the Court is to apply the same standard of legal sufficiency as applies under Rule 12(b)(6), id.; and it appearing under Rule 12(b)(6), the Court generally must accept as true all of the factual allegations in the complaint, and must draw all reasonable inferences in favor of the plaintiffs, Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 134 (3d Cir. 2004), Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001); but it also appearing that the Court need not credit bald assertions or legal conclusions alleged in the complaint, In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1429-30, Morse v. Lower Merion

Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); and it appearing that a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)", Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007); and it appearing that the Court looks only to the pleadings when reviewing a motion to amend as to futility, Pharm. Sales & Consulting Corp. v. J.W.S. Delavau, Co., Inc., 106 F.Supp.2d 761, 765 (D.N.J. 2000); and

THE COURT noting that a plaintiff asserting a breach of the duty of care under the Act must allege that the partner engaged in "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law", N.J.S.A. § 42:1A-24(c); and the Court further noting that a plaintiff cannot rely merely on a showing of unfair price, but rather must show that gross negligence caused the assets to be sold at an unfair price, see Katell v. Morgan Stanley Group, Inc., No. 12343, 1995 WL 376952, at *11 (Del. Ch. Div. June 15, 1995);¹ and

THE COURT also noting that a plaintiff asserting a breach of the duty of loyalty under the Act must allege that the partner

¹ It appears that there is no case law defining or illustrating conduct of the type alleged in the proposed Third Amended Complaint constituting a breach of the duty of care or the duty of loyalty under the Act. The Court therefore relies upon cases applying these terms under Delaware limited partnership and corporate law but otherwise analogous to the plaintiffs' claims here.

either (1) failed to "account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner", (2) "knowingly" dealt with the partnership "as or on behalf of a party having an interest materially adverse to the partnership", or (3) committed "actions intended to cause material injury to the partnership", N.J.S.A. § 42:1A-24(b); and the Court further noting that a partner may breach the duty of loyalty by receiving a personal benefit from a transaction not received by the other partners generally, or to the detriment of other partners, see Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993); Miller v. Am. Real Est. Partners, L.P., No. 16788, 2001 WL 1045643, at *12 (Del. Ch. Div. Sept. 6, 2001); and

THE PLAINTIFFS arguing that the proposed Third Amended Complaint sets forth sufficient factual allegations to support their breach of fiduciary duty claims, asserting, inter alia, that the defendants breached their duty of (1) care by failing to adequately appraise and investigate the value of the partnership's interest in the property, when "an independent appraisal has revealed that the property was, in fact, worth \$40.5 million at the time defendants sold it" as opposed to \$17.2 million (dkt. entry no. 40, Pl. Br., at 5-6), and (2) loyalty by basing the decision to sell the partnership interest on personal preferences, to the detriment of the other partners (id. at 7-11); and

THE DEFENDANTS arguing in response that, inter alia, the proposed Third Amended Complaint would be futile because the plaintiffs have not shown that the defendants breached their duty of (1) care, as they have not shown that the defendants' appraisal of the property was inadequate, other than the allegation that the plaintiffs' appraiser "reached a different number" (dkt. entry no. 43, Def. Br., at 7), and (2) loyalty, as they have not shown that the defendants' personal preferences were intended to cause injury to the partnership or were adverse to the partnership, especially given that an additional reason for selling the property was the current state of the market (id. at 10); and

THE COURT determining that assuming all facts asserted in the proposed Third Amended Complaint are true, the plaintiffs have set forth sufficient factual allegations in support of their breach of the duties of care and loyalty claims to "raise a right to relief above the speculative level", Twombly, 127 S.Ct. at 1965 (see dkt. entry no. 40, Proposed 3d Am. Compl., at ¶¶ 22, 35, 54 (asserting, inter alia, that (1) the \$8.6 million purchase price for the partnership interest based on a valuation of \$17.2 million for the property was substantially less than \$40.5 million, the fair market value of the property at the time of the sale, based on an appraisal commissioned by the plaintiffs, and (2) a memorandum to the defendants from the purchaser of the

property states that the decision to sell the partnership interest was based in part on "personal preferences")); and the Court thus intending to grant the motion to reopen and file the proposed Third Amended Complaint; and the Court deciding the motion without oral hearing and on the papers, see Fed.R.Civ.P. 78; and for good cause appearing;

IT IS THEREFORE on this 26th day of November, 2007
ORDERED that the plaintiffs' motion to reopen the case and file
the proposed Third Amended Complaint (dkt. entry no. 40) is
GRANTED; and

IT IS FURTHER ORDERED that the Clerk of the Court will
REOPEN this action; and

IT IS FURTHER ORDERED that the plaintiffs are **DIRECTED** to
separately file the third amended complaint by **DECEMBER 10, 2007.**

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge